Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

DAVID WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Application Of The Relevant Conduct Concept In U.S.S.G. Sec. 1B1.3(a) Violates Due Process In Drug Cases In That It Permits A District Court To Determine The Element Of Quantity And Thereby Fix The Statutory Sentencing Maximum And Minimum?

2. Whether This Court's Decision In *Apprendi v. New Jersey* Renders Application Of U.S.S.G. Sec. 1B1.3(a) Unconstitutional In A Drug Offense Sentencing?

3. Whether The Element Of Quantity In A Drug Case Must Be Decided By A Jury Or Be The Subject Of An Admission?

4. Whether Application Of A Reasonable Doubt Standard To U.S.S.G. Sec. 1B1.3(a) Renders It Consistent With Due Process In A Drug Offense Sentencing Involving Quantity?

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Appendix B — Relevant United States Sentencing Guideline 17a

Petitioner prays that a writ of certiorari issue to review the judgments of the Third Circuit entered in this proceeding on December 21, 2000.

OPINION BELOW

The opinion of the Third Circuit Court of Appeals is reported at 235 F.3d 858 (3d Cir. 2001) and a copy is appended to this Petition at 1a.

STATEMENT OF JURISDICTION

The decision of the Third Circuit Court of Appeals is dated December 21, 2000. An application was made to Associate Justice David H. Souter seeking an extension of time within which petitioner could timely file the within petition for certiorari. Justice Souter issued an order extending the time until May 21, 2001.

The jurisdiction of the Supreme Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Fifth and Sixth and Amendments to the United States Constitution and U.S.S.G. Sec. 1B1.3(a). (Pet. App. 17a).

STATEMENT OF THE CASE

A. The Legal Issue

i. Introduction

The instant Petition For Certiorari presents this Court with a question of great public and juridical significance. Specifically, herein we raise the question as to the present constitutionality of enhancing a criminal defendant's guidelines sentence on the basis of a finding of relevant conduct not charged in the indictment. In the case at bar, the alleged relevant conduct not charged in the indictment related to petitioner's alleged complicity in possession of additional narcotics. The evidence relied upon by the district court consisted of hearsay statements by petitioner's son to FBI agents attributing ownership of the additional narcotics to petitioner.

It is of particular significance that the United States agreed not to prosecute petitioner for the additional narcotics or to use them in the guidelines equation as to amount. Indeed, the plea agreement contained a stipulation to this effect. So too, the instant case is particularly suited for resolution of the issue by this Court because drug quantity essentially controls the base offense level in narcotics cases. Simply stated, other than the identity of the substance, quantity in itself determines the minimum and maximum sentences. Supplementing amount by virtue of so-called relevant conduct allows the district court to determine an element of the offense by a preponderance of the evidence.

ii. The Effect Of Apprendi

At the time of sentencing, case law clearly authorized the district court to disregard the stipulation; supplement the amount, and thereby raise the guidelines. Pursuant to case law, the district court could, in fact, do so if it found evidence of relevant conduct by a preponderance of the evidence. *See United States v. Rutter*, 897 F.2d 1558, 1560 (10th Cir. 1990). However, post-sentencing this Court rendered an opinion in *Apprendi v. New Jersey*, __ U.S. __, 120 S. Ct. 2348 (2000), which in our view nullified prior law. The issue in *Apprendi* was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt." *Apprendi v. New Jersey*, *supra* at 2351. The *Apprendi* Court ruled:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Id. at 2362.

We argued in the Third Circuit that this matter should be remanded to the district court for a determination as to whether *Apprendi* precludes the form of sentencing enhancement undertaken herein. A fact other than a prior conviction was utilized to enhance the guidelines penalty applicable to the amount of narcotics charged in the indictment. We iterate that quantity is an element of the offense.

The district court's consideration of the uncharged conduct raised petitioner's statutory maximum from 0-20 years to 5-40 years but he received a sentence within the unenhanced 20 year range. As noted, the enhancement at issue was accomplished on the basis of proof less than beyond a reasonable doubt and essentially convicted petitioner of a new crime, absent any presentation of it to a grand or petit jury. The Third Circuit did not effect a remand, opting in favor of a decision on the merits.

iii. The Third Circuit's Decision

The Third Circuit's decision is set forth in *United States v. Williams*, 235 F.3d 858 (3d Cir. 2000). The *Williams* court articulated the two issues before it as: (1) whether this Court intended *Apprendi* to apply to cases in which the trial judge decides a fact that increases a defendant's sentence under the sentencing Guidelines, but the sentence imposed does not exceed the statutory maximum; and (2) whether this Court intended *Apprendi* to apply to cases in which judicial fact finding increases the possible sentence to be received above the statutory maximum. *Id.* at 860-861.

The *Williams* court held that *Apprendi* does not apply to the increase in petitioner's sentence under the sentencing guidelines. The court in *Williams* stated that *Apprendi* did not directly address this issue, because it concerned a sentence under state law. *United States v. Williams*, *supra* at 862; *see Apprendi v. New Jersey*, *supra* at 2366 n.21 (citing *Edwards v. United States*, 523 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998)).

The *Williams* court then analyzed the issue of whether "the fact that the district court's finding increased the possible

statutory maximum . . . implicates *Apprendi*". 235 F.3d, *supra* at 863. The *Williams* court stated that the *Apprendi* Court "was ambiguous as to whether its holding should apply in such a situation". *Id.* The court in *Williams* stated:

> The Court in *Apprendi* characterized the constitutional rule as: It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. The Court also stated that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id. at 863.

The Third Circuit conceded that "by those formulations, it could be argued that the *Apprendi* rule does apply to [petitioner], because the district court's finding increased the prescribed range of penalties and the maximum penalty to which [petitioner] was exposed". *United States v. Williams, supra* at 863. In ruling against petitioner, the *Williams* court isolated this Court's statement in *Apprendi* that "nothing in this [opinion] suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment within the range prescribed statute". *United States v. Williams, supra* at 863. The *Williams* court formulated several ratiocinations for its ruling. The court stated:

> First and foremost . . . *Apprendi* is not applicable to [petitioner's] sentence, because the sentence

> actually imposed was well under the original statutory maximum of 20 years. Second, the 20-year maximum was confirmed several times, in the course of [petitioner's] plea and sentence . . . Third, based upon the amount of drugs that the District Court found attributable to [petitioner], it would not be possible for the district court to sentence exceeding 20 years under the Sentencing Guidelines . . . Fourth, the District Court's finding that the drugs [outside the indictment] were attributable to [petitioner] for sentencing purposes could be characterized as a finding of relevant conduct . . . Finally, the fact that an upward departure from a lower sentence range would likely be within the District Court's discretion based on [petitioner's] lengthy criminal history lends further support to our decision not to vacate the sentence on *Apprendi* grounds.

Id. at 865-865.

iv. The Third Circuit Is Incorrect

Petitioner submits that the Third Circuit erred in its narrow reading of *Apprendi*. It bears repeating that in federal narcotics cases, the element of the offense of amount basically determines the sentencing minimum and maximum. Therefore, quantity is the indisputably most significant element of the offense.[1] Accordingly, a plea to a particular amount or jury finding relative thereto is to a degree sacrosanct in terms of proof of the applicable amount.

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1. The singular exception may be with respect to identification of cocaine as being crack.

In this context, we stress that the "relevant conduct" provision of the Sentencing Guidelines permits a district court to essentially convict and sentence a criminal defendant of drug amounts not charged by the grand jury; not considered by a petit jury, nor the subject of an admission in the context of a guilty plea. The district court is constrained only by the preponderance of the evidence standard. And, the district court may even use the relevant conduct concept to sentence the defendant for acquitted conduct. *See United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 554 (1997).

It must be clearly understood that this Court in *Apprendi* ruled that a criminal defendant is entitled to a "jury determination that he is guilty of every element of the crime with which he is charged beyond a reasonable doubt". 120 S. Ct. *supra* at 2356. Of course a guilty plea also accomplishes the intended constitutional objectives served by proof beyond a reasonable doubt. *Apprendi v. New Jersey, supra* at 2361. To avoid the clear import of this ruling, various Courts of Appeal have sought to hinge the constitutional protections on whether the District Court's sentence for the uncharged quantity effects a sanction above the ordinary statutory maximum. *See United States v. Williams, supra.* This transparent analysis does nothing more than transpose statutory maximum into a ceiling below which all constitutional transgressions may be masked as alleged sentencing factors. *See Mullaney v. Wilbur*, 421 U.S. 684 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

In *McMillan v. Pennsylvania*, 477 U.S. *supra* at 1, this Court "coined the term sentencing factor to refer to a fact

that was not imposed by a judge but could affect the sentence imposed by the judge." *Apprendi v. New Jersey*, *supra* at 2360. With respect to this concept of sentencing factor, the *Apprendi*, Court stated:

> Any possible distinction between an element of a felony offense and a sentencing factor was unknown to the practice of criminal indictment, trial by jury, and judgment by court . . . criminal proceedings were submitted to a jury after being initiated by an indictment containing all the facts and circumstances which constitute the offense . . . stated with certainty and precision, that the defendant may be enabled to determine the species of offense they constitute, in order that he may prepare his defense accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted . . . The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.

Id. at 2356.

The *Apprendi* Court observed that "trial practices [can] change in the course of centuries [but must] still remain true to the principles that emerged from the Framers' fears that the jury right could be lost not only by gross denial, but by erosion". 120 S. Ct. *supra* at 2359; *Jones v. United States*, 526 U.S. 227, 117 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). Succinctly stated, practice must at least adhere to the basic principles undergirding the requirements of trying to a jury

all facts necessary to constitute a statutory offense, and proving these facts beyond a reasonable doubt". *Id.*

> The practice utilized herein of enhancing a sentence because of uncharged so-called relevant conduct is encompassed within the *Apprendi* Court's rejection of procedures which circumvent constitutional protections by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment". *Apprendi v. New Jersey, supra* at 2360; The Court in *Apprendi* stated further: [It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 2363.

The Third Circuit failed to apprehend that the practice utilized below was contrary to the holding in *Apprendi.* The relevant conduct enhancement increased the prescribed range of penalties to which petitioner was exposed. The procedure did not entail "trying to a jury all facts necessary to constitute a statutory offense, [and/or] proving these facts beyond a reasonable doubt". *Apprendi v. New Jersey, supra* at 2359. Moreover, no knowing and intelligent guilty plea validated the finding as to the quantity associated with the so-called relevant conduct. The district court's post-plea disregard of a stipulation as to amount determined the statutory sentencing range, thereby redefining the critical

element of quantity as a factor bearing solely on punishment. That process is a clear circumvention of due process and must be so pronounced by this Court.

B. The Case At Issue

District of New Jersey Indictment No. 98-620-02 charged petitioner David Williams with: conspiracy in violation of 21 U.S.C.A. § 841(a)(1) (Counts Five, Seven, Eight and Nine). On March 3, 1999 petitioner appeared before the Honorable Garrett E. Brown, Jr., U.S.D.J.; and entered a plea of guilty to Count Nine.

In return for the plea, the United States agreed not "to initiate any further charges against petitioner pursuant to the terms of the January 29, 1999 plea letter . . . [and that it would] not initiate any charges against [petitioner] relating to the October 8, 1999 seizure of contraband from 36 Hawthorne Place, Apt. 2-I, Montclair, New Jersey". The contraband seized from 36 Hawthorne Avenue was not charged in the indictment. The United States and petitioner stipulated that the applicable amount of heroin for guidelines purposes was 67.2 grams resulting in a base offense level of 22. It was further agreed that petitioner was entitled to a three point reduction for acceptance of responsibility. The plea agreement and stipulation limited petitioner's exposure to a sentence between 0 and 20 years.

In the presentence report, the probation department recommended that the district court consider the narcotics seized from the Hawthorne Avenue apartment in its guidelines equation. Stated somewhat differently, the probation department urged the district court to disregard the stipulation entered into between petitioner and the United

States. The probation officer who prepared the report relied upon statements made to FBI agents by petitioner's son. Those statements attributed ownership of the narcotics seized from the Hawthorne Avenue apartment to petitioner. The quantity urged by the probation department raised petitioner's exposure to a sentence between 5 and 40 years.

On May 24, 1999 petitioner appeared before the district court for sentencing. The district court agreed with the probation department and considered the narcotics seized from 36 Hawthorne Place apartment in its guidelines calculation. That decision raised petitioner's base offense level to 28 prior to the three point reduction for acceptance of responsibility which reduces it to 25. Petitioner's criminal history category was III placing him in a range of 70-87 months. The district court thereafter imposed a sentence of 85 months imprisonment on petitioner. That sentence was substantially higher than the 51-63 months associated with the stipulated amount.

Final judgment was entered on June 3, 1999. Notice of Appeal was filed on June 3, 1999. On December 21, 2000 the Third Circuit affirmed.

This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THIS COURT'S OPINION IN *APPRENDI v. NEW JERSEY* PRECLUDES A DISTRICT COURT FROM USING U.S.S.G. SEC. 1B1.3(a)(1) TO ENHANCE A DRUG SENTENCE ON THE BASIS OF UNCHARGED SO-CALLED RELEVANT CONDUCT CONCERNING QUANTITY

The gist of the Third Circuit's decision in *Williams* is that U.S.S.G. Sec. 1B1.3(a) authorized the district court to ignore the stipulation and enhance petitioner's sentence on the basis of proof of an uncharged quantity of narcotics by a preponderance of the evidence. Prior to the decision in *Apprendi*, it was clearly the norm for district courts to interpret applicable law in this fashion. However, a review of both Sec. 1B1.3(a) and the decision in *Apprendi* establish that at present there is no basis for such an interpretation. Indeed, it is unconstitutional.

As pertinent hereto, Sec. 1B1.3(a) states:

> (a) *Chapters Two (Offense Conduct) and Three (Adjustments)*. Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> . . . .
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

The provision on its face permits a sentence to be enhanced with any uncharged conduct that occurred during the commission of the offense of conviction or in preparation for that offense.

In cases where drug amount is the paramount element in an indictment, the provision improperly permits a district court to decide that element after a trial or plea and to determine the sentencing range. *See United States v. McCaskey*, 9 F.3d 368 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1565, 511 U.S. 1042, 128 L. Ed. 2d 211 (1993); *cf. United States v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001) (A district court may consider at sentencing and act upon acquitted conduct citing *United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997)).

It cannot be gainsaid that quantity is not merely a sentencing factor in the context of a narcotics indictment. We iterate that quantity basically controls the minimum and maximum sentencing exposure of the criminal defendant. So too, a finding that the defendant did not possess any

quantity or conspire to do so mandates an acquittal. Stated somewhat differently, there can be no narcotics conviction without a determination of quantity. Therefore, it is beyond dispute that the provision raises "the due process and Sixth Amendment concerns implicated in allowing a judge to determine a fact increasing punishment beyond the maximum of the statutory range". *Apprendi v. New Jersey*, 120 S. Ct. at 2362. The provision allows the district court to independently determine the statutory range by deciding the indispensable element.

Where, as here, the judicial finding increased petitioner's exposure from 0-20 years to 5-40 years, the concern becomes a reality. The failure to impose a sentence greater than 20 years is not constitutionally significant. Petitioner received an additional period of years on proof less than beyond a reasonable doubt because of a fact other than a prior conviction. From our perspective, it is inescapable that Sec. 1B1.3(a) must be set aside to the extent that it contravenes the principle that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt". *Apprendi v. New Jersey*, 120 S. Ct. at 2362-2363. In this context, the *Apprendi* court stated:

> It is unconstitutional for a legislature to remove from the jury facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 2363.

In *United States v. Ramirez*, 242 F.3d 348 (6th Cir. 2001), a panel of the Sixth Circuit agreed with our position. The *Ramirez* court apprehended that the drug statutes are predicated upon progression of increased mandatory penalties based in part on the quantity of drugs. That structure invokes, under *Apprendi*, the full range of constitutional protections required for elements of the crime. The court in *Ramirez* stated that "prior to *Apprendi* . . . drug weight was merely a sentencing factor . . . but under *Apprendi*, this view is no longer possible. 242 F.3d *supra* at 351. *See United States v. Page*, 232 F.3d 536, 542-543 (6th Cir. 2001); *but see United States v. Smith*, 240 F.3d 732, 737 (8th Cir. 2001) (The district court may determine at sentencing the quantity of drugs involved).

In *United States v. Fields*, 242 F.3d 393 (D.C. Cir. 2001), the District of Columbia Circuit Court of Appeals also ruled in accord with the premise upon which our argument is based. The *Fields* court stated that drug quantity is an element of the offense because a factual determination of the amount of drugs at issue *may* result in a sentence that exceeds a maximum sentence prescribed in the applicable statute. 242 F.3d *supra* at 395. *See United States v. Harris*, 243 F.3d 806 (4th Cir. 2001); *United States v. Sullivan*, 242 F.3d 1248 (10th Cir. 2001); *United States v. Gatewood*, 230 F.3d 186 (6th Cir. 2000); *United States v. Terry*, 240 F.3d 65 (1st Cir. 2001); *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000).

It is beyond cogent dispute that *Apprendi* cannot be reconciled with U.S.S.G. Sec. 1B1.3(a) in drug cases where the district court seeks to enhance quantity on the basis of a relevant conduct analysis. *See United States v. Sandoval*, 241 F.3d 549 (7th Cir. 2001) (demonstrating the distinction

between narcotics and weapons offenses). In *United States v. Salazar-Flores*, 238 F.3d 672, 673 (5th Cir. 2001), the Fifth Circuit voiced its agreement with the concept that quantity is clearly an element where it is used in a capacity "to enhance penalties based on the amount of drugs". The *Salazar-Flores* court, however, incorrectly found no *Apprendi* violation where the enhancement did not raise the sentence above the statutory maximum of the offense presented to the jury therein. 238 F.3d *supra* at 674. This matter is distinguishable because it involves a plea and stipulation.

The instant matter presents the most egregious form of due process violation. Petitioner admitted possession of a particular amount of cocaine and agreed with the United States that it represented the exclusive basis for quantity-based sentence adjustments. The district court ignored the stipulation and enhanced the sentence by a period of years. The amount adopted by the district court was not only outside the stipulation — it was outside the charges set forth in the indictment. This Court must rule that the provision is unconstitutional both because it removes from the jury or guilty plea process the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed and permits the increase of a maximum penalty based on a fact other than a prior conviction. *United States v. Williams*, 235 F.3d *supra* at 863, *citing Apprendi v. New Jersey supra*. The applicability of *Apprendi* is clear.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE MERITLESS ARGUMENT THAT A PROOF BEYOND A REASONABLE DOUBT STANDARD WOULD RENDER APPLICATION OF U.S.S.G. SEC. 1B1.3(a) CONSTITUTIONAL IN DRUG CASES

As was set forth *infra*, the application of U.S.S.G. Sec. 1B1.3(a) to drug cases permits a district court to essentially convict and sentence a criminal defendant of an uncharged crime by a preponderance of the evidence. The statute is fatally infirm because it cannot be reconciled with the decision in *Apprendi* when applied in a case where the element of the offense of drug quantity is sought to be determined as relevant conduct. That element determines the statutory range.

The next level of argument which stems from the inability to reconcile *Apprendi* and Sec. 1B1.3(a) is whether substitution of a proof beyond a reasonable doubt standard would be constitutionally sufficient. That argument adopts the position that a judge could substitute his assessment for a jury finding or by use of that standard supplant the necessity of an admission by the criminal defendant as part of a plea. *See United States v. Pease*, 240 F.3d 398, 944 (11th Cir. 2001) (A guilty plea concerning quantity is an adequate substitution for a jury verdict).

We fully support the statement in *Apprendi* that the "reliance on the reasonable doubt standard reflects a profound judgment about the way in which the law should be enforced and justice administered". 120 S. Ct. *supra* at 2356. We further acknowledge the inherent ruling of the

Apprendi Court that "the right to a speedy and public trial, by an impartial jury" is the essence of the "constitutional protections of surpassing importance" in a criminal matter. *Apprendi v. New Jersey, supra* at 2355-2356. That latter observation excludes any cogent claim that substitution of the reasonable doubt standard saves Sec. 1B1.3(a) from its doom because of the decision in *Apprendi.*

The only constitutional exception to a jury finding concerning the quantity element of the offense is a plea or admission by the criminal defendant. *See Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 350 (1998). An admission of three earlier convictions by the criminal defendant underpinned the affirmance in *Almendarez-Torres v. United States, supra.* The prior convictions were arguably elements of the offense. In so noting, the *Apprendi* Court stated that in *Almendarez-Torres* "no question [existed] concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact that was before the Court". *Apprendi v. New Jersey, supra* at 2361.

Further, the *Almendarez-Torres* Court in its affirmance relied heavily upon the fact that the additional sentence to which the defendant was subject was the prior conviction of a serious crime. 523 U.S. at 230, 243. That aspect of the case is consistent with *Apprendi. See United States v. Jackson*, 240 F.3d 1245, 1249 (10th Cir. 2001) (Defendant stipulated to an amount of cocaine base sufficient to support the sentence).

In sum, substitution of the reasonable doubt standard does not reconcile Sec. 1B1.3(a) and this Court's decision in *Apprendi*. Decision of an element of the offense must be the product of a jury finding or admission. Due process demands no less.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 21, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5431

UNITED STATES OF AMERICA,

v.

DAVID WILLIAMS,

Appellant.

Dec. 21, 2000.

* * *

Before SLOVITER, AMBRO, and GARTH, Circuit Judges.

OPINION OF THE COURT

GARTH, Circuit Judge:

Appellant David Williams ("Williams") appeals the District Court's enhancement of his sentence in light of the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). We have jurisdiction over this appeal under 28 U.S.C. § 1291. For the following reasons, we affirm the District Court's sentence.

Appendix A

I.

On October 7, 1998, a grand jury for the District of New Jersey issued a fourteen-count indictment, in which Williams was charged with five counts of conspiracy to distribute heroin, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, and 18 U.S.C. § 2. An arrest warrant was issued for Williams on October 8, 1998 at his last known address, 36 Hawthorne Place, Apartment 2I, Montclair, New Jersey (the "Hawthorne Place apartment"). Williams' son, Charod Jermaine Williams, was at the apartment when the FBI agents and local police officers arrived, and he consented to a search of the apartment. The search of the Hawthorne Place apartment revealed, *inter alia,* 293.4 grams of heroin and 311.2 grams of cocaine.

Williams entered into a plea agreement with the Government on Count Seven of the Indictment. The terms of the plea agreement are set forth in the Government's letter of January 29, 1999. The plea agreement states that "[t]he sentencing judge may impose the maximum term of imprisonment and the maximum fine that are consistent with the Sentencing Reform Act and the Sentencing Guidelines, up to and including the statutory maximum term of imprisonment and the statutory maximum fine." The plea agreement further specifies that "[t]he violation of 21 U.S.C. § 841(a)(1) charged in Count Seven of the Indictment . . . carries a statutory maximum penalty of 20 years' imprisonment and a $1,000,000 fine."

The plea agreement also asserts that, "[i]f David Williams enters a guilty plea and is sentenced on this charge,

the United States Attorney for the District of New Jersey will not initiate any further charges against David Williams relating to the specific criminal conduct to which David Williams has agreed to plead guilty pursuant to this letter, nor will the United States Attorney for the District of New Jersey initiate any charges against David Williams relating to the 8 October 1998 seizure of contraband from 36 Hawthorne Place, Apartment 2I, Montclair, New Jersey."

In connection with the plea agreement, Williams and the Government stipulated that the amount of heroin involved in his violation of 21 U.S.C. § 841(a)(1) was approximately 67.2 grams, making the base offense level for his violation 22. In addition, the parties stipulated to a downward departure of 3 points for acceptance of personal responsibility, for a total offense level of 19.

On March 3, 1999, a plea hearing was held before the District Court. At the plea hearing, Williams answered in the affirmative when asked by the District Court, "Do you understand that you could receive up to 20 years in prison and a fine of $1 million or both?" and when asked whether he understood that "this Court has the authority to impose sentence more severe than the statutory maximum or less severe than that provided by the guidelines." (Da-27-28.) At the hearing, Williams' plea of guilty to Count Seven of the Indictment was accepted.

Also on March 3, 1999, Williams filled out an Application for Permission to Enter a Plea of Guilty, which stated, "[m]y lawyer has informed me, and I understand, that the maximum punishment which the law provides for the

offense(s) charged in this Complaint/Indictment/ Information is: A MAXIMUM OF 20 years imprisonment and a fine of $1,000,000 for the offense(s) charged in Count(s) 7." (Govt. Ap. 18.)

The Presentence Report ("PSR"), prepared on April 5, 1999 and revised on May 4, 1999, recommended that 361 grams of heroin and 311.2 grams of cocaine be applicable to Williams for sentencing purposes. The drug quantity was apparently based on sales of heroin in which Williams was involved totaling 67.2 grams, plus the 293.4 grams of heroin and 311.2 grams of cocaine found in the Hawthorne Place apartment. The PSR calculated Williams' base offense level at 28, converting the amounts of heroin and cocaine into the equivalent total amount of marijuana and applying the Drug Quantity Table in U.S.S.G. § 2D1.1(c). The PSR then subtracted 3 points for acceptance of responsibility, leaving Williams' total offense level at 25. The PSR assigned Williams a total of 6 criminal history points, placing him in Criminal History Category III.

The PSR specified that "[t]he maximum term of imprisonment is 20 years. 21 U.S.C. § 841(b)(1)(C)." The PSR stated that the guideline range for a total offense level of 25 and a criminal history category of III was 70 to 87 months.

A sentencing hearing was held on May 24, 1999. At the hearing, the issue was raised of whether the drugs seized from the Hawthorne Place apartment should be included in the calculation of Williams' offense level. The District Court found: "It is clear from the submission of Probation and the

FBI reports, and of course the Defendant doesn't contest that that's what the FBI would testify if they were called,[1] that the larger amount, the amount in the apartment, should be attributed to the Defendant. Therefore, I will adopt the presentence report." (Da-50.) The District Court adopted the PSR's assignment to Williams of a total offense level of 25 and criminal history category III, for which the sentencing range is 70 to 87 months, and observed that criminal history category III "clearly understates his true criminal history." (Da-52.) The District Court then sentenced Williams to 85 months incarceration. (Govt. Ap. 25.)

The District Court entered final judgment in this matter on June 2, 1999, and Williams filed a timely Notice of Appeal on June 3, 1999.

II.

On appeal, we must determine whether the Supreme Court's decision in *Apprendi v. New Jersey* has an effect on the District Court's sentencing of Williams, to the extent that his sentence was altered by the District Court's finding that the drugs found in the Hawthorne Place apartment should be attributed to Williams for sentencing purposes.

There are two issues that we must look at in deciding whether to apply *Apprendi* to this case: 1) whether the Supreme Court intended *Apprendi* to apply to cases in which the trial judge decides a fact that increases a defendant's

1. Defense counsel indicated at the hearing that Williams did not doubt the FBI agents' testimony, but challenged the veracity of what Charod Williams had told the agents. (Da-44.)

sentence under the Sentencing Guidelines, but the sentence imposed does not exceed the statutory maximum;[2] and 2) whether the Supreme Court intended *Apprendi* to apply to cases in which judicial fact finding increases the possible sentence to be received above the statutory maximum, but the actual sentence is below the statutory maximum. We exercise plenary review over the District Court's application of the Sentencing Guidelines and the possible constitutional implication of Williams' sentence under *Apprendi*. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 510, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *United States v. Thomas*, 221 F.3d 430, 433-34 (3d Cir.2000).

In *Apprendi*, the defendant had pleaded guilty, pursuant to a plea agreement, to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb. Under New Jersey law, the second degree offenses carried a penalty range of 5 to 10 years and the third-degree offense carried a penalty of 3 to 5 years.

Under the plea agreement, the State reserved the right to request an enhanced sentence of 10 to 20 years for one of the second-degree counts on the ground that the offense was committed with a biased purpose, because that offense was based on an incident in which the defendant had fired several shots into the home of an African American family that had

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2. Williams raises the issue on appeal as to whether *Apprendi* "precludes enhancement of a guidelines sentence by consideration of an additional amount of narcotics not charged in the indictment on a standard of proof less than beyond a reasonable doubt." (Appellant's Brief, at 5.)

recently moved to a previously all-white neighborhood. The defendant reserved the right in the plea agreement to challenge any such hate crime sentence enhancement as violating the United States Constitution.

The New Jersey trial court found that the hate crime enhancement did apply and sentenced the defendant to 12 years on that count, two years more than the maximum sentence for second-degree offenses without the enhancement, and the trial court sentenced the defendant to two shorter sentences on the other two counts to run concurrently with the 12-year sentence. The Supreme Court vacated as unconstitutional the sentence imposed by the trial court, which had been affirmed by the New Jersey Superior Court, Appellate Division and by the New Jersey Supreme Court. The Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-63.

In this case, Williams was charged under 21 U.S.C. § 841(a)(1), which does not specify the applicable penalties. However, § 841(b)(1) sets forth penalties dependent on the amount of drugs involved. Section 841(b)(1)(A) provides for imprisonment of 10 years to life if "1 kilogram or more of a mixture or substance containing a detectable amount of heroin" is involved. Under § 841(b)(1)(B), a person may be sentenced to 5 to 40 years imprisonment for a violation involving "100 grams or more of a mixture or substance containing a detectable amount of heroin." Finally, § 841(b)(1)(C) states that, "[i]n the case of a controlled substance in schedule I [which includes heroin] . . . , except

as provided in subparagraphs (A), (B), or (D), such person shall be sentenced to a term of imprisonment of not more than 20 years."

Under the plea agreement, Williams stipulated to 67.2 grams of heroin being involved in Count Seven and/or his relevant conduct alleged in Counts Five, Eight, and Nine of the Indictment, for which the applicable statutory maximum sentence is 20 years, under 21 U.S.C. § 841(b)(1)(C).[3] The base offense level for between 60 and 80 grams of heroin under the Sentencing Guidelines is 22, and the plea agreement recommended a 3 point reduction in offense level for acceptance of responsibility. Williams was placed in criminal history category III by the PSR and by the District Court. With a total offense level of 19 and criminal history category III, his sentence range under the Sentencing Guidelines was 37 to 46 months.

At the sentencing hearing, the District Court found that the amount of drugs involved in Williams' offense was 361 grams of heroin and 311.2 grams of cocaine, on the recommendation in the PSR that the drugs found at Hawthorne Place apartment should be attributed to Williams. This increased Williams' base offense level to 28. At a total offense level of 25 (28 minus 3 points for acceptance of responsibility) and a criminal history category of III, the sentencing range for Williams was 70 to 87 months. The District Court sentenced Williams to 85 months.

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3. That this statutory maximum was applied to Williams is confirmed in the plea agreement, by the District Court at the plea hearing, in Williams' Application for Permission to Enter a Plea of Guilty, and in the PSR.

Appendix A

A.

Initially, we hold that *Apprendi* does not apply to the increase in Williams' sentence under the Sentencing Guidelines. *Apprendi* did not directly address this issue, because it concerned a sentence under state law. With regard to the Sentencing Guidelines, the Court stated: "The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held." 120 S.Ct. at 2366 n. 21 (citing *Edwards v. United States*, 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998)).

In *Edwards v. United States*, the Supreme Court heard a claim by several defendants that a district judge's sentences of them for violation of 21 U.S.C. §§ 841 and 846 involving cocaine and crack distribution were unlawful, insofar as they were based on crack, because the jury was not presented with the issue of whether their conduct involved cocaine or crack and the Sentencing Guidelines imposed higher penalties for distribution of crack than for distribution of cocaine. 523 U.S. at 513, 118 S.Ct. 1475. The Court upheld the District Court's sentences, stating "[t]he Sentencing Guidelines instruct *the judge* in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable-and then to impose a sentence that varies depending upon amount and kind." *Edwards*, 523 U.S. at 513-14, 118 S.Ct. 1475 (emphasis in text). The Court noted that the outcome of the case may have been different if the District Court's sentence had exceeded the maximum permitted by statute. The Court explained:

> Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG § 5G1.1. But, as the Government points out, the sentences imposed here were within the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner.

Edwards, 523 U.S. at 515, 118 S.Ct. 1475.

The Court also stated in *Apprendi* that "nothing in this history [of requiring a jury determination of guilt for every element of the crime charged] suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing judgment within the range prescribed by statute." 120 S.Ct. at 2358. Though the application of the Sentencing Guidelines by judges is not entirely discretionary, *see United States v. Mistretta*, 488 U.S. 361, 391, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (stating that "the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases"), the Sentencing Guidelines are in effect a codification of judges' exercise of discretion in sentencing precisely in the manner described by the Court. As Chief Judge Becker stated in his concurrence in *United States v. Mack*, "the Sentencing Guidelines are . . . a constitutional mechanism for channeling

the discretion that a sentencing court would otherwise enjoy." 229 F.3d 226, 243 (3d Cir.2000) (Becker, J., concurring).

As in *Edwards*, the District Court's finding in this case increased Williams' sentence under the Sentencing Guidelines, but the sentence did not exceed the statutory maximum. Accordingly, we hold that the District Court's finding was a permissible exercise of discretion, to the extent that the finding altered Williams' sentence under the Sentencing Guidelines. This holding is bolstered further by our observation in *United States v. Cepero* that, "[b]ecause application of the Sentencing Guidelines in this case does not implicate a fact that would increase the penalty of a crime ~~beyond~~ the statutory maximum, the teachings of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), are not relevant here." 224 F.3d 256, 267 n. 5 (3d Cir.2000).

B.

We must now turn to the issue of whether the fact that the District Court's finding increased the *possible* statutory maximum under 21 U.S.C. § 841(b)(1) implicates *Apprendi*. In *Apprendi*, the Court was ambiguous as to whether its holding should apply in such a situation. The Court in *Apprendi* characterized the constitutional rule as: " '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase *the prescribed range of penalties* to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' " *Apprendi*, 120 S.Ct. at 2363 (quoting *Jones*, 526 U.S. at 252-53, 119 S.Ct. 1215 (opinion

of Stevens, J.)) (emphasis added). The Court also stated that " 'any fact (other than prior conviction) that increases the *maximum penalty* for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " 120 S.Ct. at 2355 (quoting *Jones*, 526 U.S. at 243 n. 6, 119 S.Ct. 1215) (emphasis added). By those formulations, it could be argued that the *Apprendi* rule does apply to Williams, because the District Court's finding increased the "prescribed range of penalties" and the "maximum penalty" to which Williams was exposed, even though his actual penalty did not exceed 20 years.

However, as discussed earlier, the Court stated in *Apprendi*: "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment within the range prescribed by statute." 120 S.Ct. at 2358. This statement suggests that a District Court's sentence that is under the statutory maximum cannot be constitutionally objectionable under *Apprendi*.[4]

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4. In this Circuit, we have addressed *Apprendi* only tangentially, in *Cepero*, discussed above, and in Judge Becker's concurrence in *United States v. Mack*, 229 F.3d 226 (3d Cir.2000). Judge Becker set forth a two-step "*Apprendi* inquiry" in *Mack*:

> A court must first determine the "prescribed statutory maximum" sentence for the crime of which the defendant was convicted and assess whether the defendant's ultimate sentence exceeded it. If it did, the court must consider the second-order Apprendi question: whether the enhanced sentence was based on

(Cont'd)

Despite the ambiguity in *Apprendi*, we hold that it does not apply to Williams' sentence for several reasons. First and foremost, though the District Court's finding regarding the amount of drugs substantially increased the possible statutory maximum sentence under 21 U.S.C. § 841(b)(1), we hold that *Apprendi* is not applicable to Williams' sentence, because the sentence actually imposed (seven years and one month) was well under the original statutory maximum of 20 years.

Second, this 20-year maximum sentence was confirmed several times in the course of Williams' plea and sentence. The plea agreement specified that the "statutory maximum penalty" for Williams' violation was 20 years imprisonment. The District Court confirmed at the plea hearing that Williams understood that he "could receive up to 20 years in prison." Williams' application to enter a guilty plea stated that he understood that the maximum punishment under law for his offense was 20 years in prison. Finally, the PSR stated that 20 years was the maximum sentence under 21 U.S.C. § 841(b)(1)(C).

Third, based on the amount of drugs that the District Court found attributable to Williams, it would not be possible

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(Cont'd)

> "the fact of a prior conviction." If it was, then the sentence is constitutional. If it was not, then the sentence is unconstitutional.

229 F.3d at 237. Under the *Apprendi* test as formulated by Judge Becker, therefore, Williams' challenge would fail because he could not get beyond step one.

quantity or conspire to do so mandates an acquittal. Stated somewhat differently, there can be no narcotics conviction without a determination of quantity. Therefore, it is beyond dispute that the provision raises "the due process and Sixth Amendment concerns implicated in allowing a judge to determine a fact increasing punishment beyond the maximum of the statutory range". *Apprendi v. New Jersey*, 120 S. Ct. at 2362. The provision allows the district court to independently determine the statutory range by deciding the indispensable element.

Where, as here, the judicial finding increased petitioner's exposure from 0-20 years to 5-40 years, the concern becomes a reality. The failure to impose a sentence greater than 20 years is not constitutionally significant. Petitioner received an additional period of years on proof less than beyond a reasonable doubt because of a fact other than a prior conviction. From our perspective, it is inescapable that Sec. 1B1.3(a) must be set aside to the extent that it contravenes the principle that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt". *Apprendi v. New Jersey*, 120 S. Ct. at 2362-2363. In this context, the *Apprendi* court stated:

> It is unconstitutional for a legislature to remove from the jury facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 2363.

Finally, at the sentencing hearing, the District Court expressed dissatisfaction with the low criminal history category assigned to Williams and indicated that the court had discretion to depart upwards under U.S.S.G. § 4A1.3.[5] Indeed, the PSR lists ten convictions between 1958 and 1970 for which no criminal history points were assigned. In addition, several of Williams' prior convictions resulted in substantial sentences of incarceration, including a sentence of 12 years in prison in 1986 for possession with intent to distribute heroin (and tax evasion).

In reviewing Williams' criminal history and considering an upward departure, the District Court stated:

> I do not feel that it is necessary to consider the [upward] departure, although there are very, very good grounds for that because his criminal history category does not adequately predict his true criminal history of likelihood of repeat offense.
>
> So, if we didn't have that range [of 70 to 87 months], I would have to consider [an upward departure]. . . .
>
> So we have a lengthy criminal history here for a number of very serious offenses. As I say, he would be a career offender by departure because there certainly is a very strong likelihood of repeat

5. Section 4A1.3 allows the District Court to consider departing from the applicable Guideline range "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."

> offense and the criminal history category of three clearly understates his true criminal history but I decline to reach that at this time because, looking at the offense level of 25 and criminal history category of three, I find that the 70 to 87 month range is sufficient to protect the public at this time. If I were wrong as to the offense level, or criminal history category, and it were lesser, I would certainly consider the upward departure for adequacy of criminal history.

(Da-50, Da-52.)

In stating that an upward departure might be appropriate but that the range of 70 to 87 months was sufficient, the District Court suggested that Williams' criminal history contributed to the sentence of 85 months. The fact that an upward departure from a lower sentence range would likely be within the District Court's discretion based on Williams' lengthy criminal history lends further support to our decision not to vacate the sentence on *Apprendi* grounds.

III.

For the foregoing reasons, we affirm the District Court's sentence.

APPENDIX B — RELEVANT UNITED STATES SENTENCING GUIDELINE

U.S.S.G. § 1B1.3

§ 1B1.3. *Relevant Conduct (Factors that Determine the Guideline Range)*

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

* * * *

AUG 24 2000
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No. 00-1771

In the Supreme Court of the United States

DAVID WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the district court was required to apply the federal Sentencing Guidelines based solely on facts that were found by the jury beyond a reasonable doubt.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 235 F.3d 858.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2000. On March 9, 2001, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April 21, 2001. On April 11, 2001, Justice Souter again extended the time within which to file a petition, to and including May 21, 2001. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of New Jersey, petitioner was convicted of distributing heroin, in violation of 21 U.S.C. 841(a). He was sentenced to 85 months' imprisonment, to be followed by three years of supervised release, and fined $5000. The court of appeals affirmed.

1. In four transactions between April and June 1998, petitioner supplied a total of 67.2 grams of heroin, bearing the brand name "Assassin," to an undercover agent and a cooperating witness.[1] On October 8, 1998, federal agents and local officers went to petitioner's last known address, an apartment on Hawthorne Place in Montclair, New Jersey, to execute a warrant for his arrest. Petitioner's son was in the apartment when the agents arrived, and he consented to a search of the apartment.

The search revealed 293.4 grams of heroin, ink pads and stamps bearing the name "Assassin," glassine bags stamped "Assassin," a scale with white powder residue on the weighing surface, cutting agents, drug packaging paraphernalia, and $49,991 in cash. The agents also found a bag containing 311.2 grams of cocaine. Petitioner's son told the agents that his father rented the apartment for him, but that the drugs, cash and drug paraphernalia belonged to petitioner. Petitioner was

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[1] On April 14, petitioner sold 200 bags containing 11.8 grams of 72% pure heroin to the undercover purchasers for $1320. On April 28, petitioner sold 300 bags containing 21 grams of 70% pure heroin to the undercover purchasers for $1980. On May 4, petitioner sold 300 bags containing 18.5 grams of 59% pure heroin to the undercover purchasers for $1980. On June 2, petitioner sold 250 bags containing 15.9 grams of 58% pure heroin to the undercover purchasers for $1650. Gov't C.A. Br. 3-5.

arrested at another location later that day. 235 F.3d at 859; Gov't C.A. Br. 6-8.[2]

2. A grand jury in the District of New Jersey returned a 14-count indictment against petitioner and two co-defendants. Petitioner was charged in five counts. Count 1 charged that petitioner conspired to distribute, and to possess with the intent to distribute, "more than 100 grams of heroin," in violation of 21 U.S.C. 846. C.A. App. 17. Counts 5, 7, 8 and 9 charged that petitioner distributed unspecified quantities of heroin on four separate occasions, in violation of 21 U.S.C. 841(a)(1). C.A. App. 19-20.

Pursuant to a written agreement, petitioner agreed to plead guilty to Count 7 and to forfeit the $49,991 that had been seized from the Hawthorne Place apartment, and the government agreed to dismiss the other counts of the indictment. C.A. App. 10-16. The plea agreement stated that the statutory maximum term of imprisonment for the offense charged in Count 7 was 20 years' imprisonment. *Id.* at 11. The agreement further provided that "[t]he sentencing judge may impose the maximum term of imprisonment * * * that [is] consistent with the Sentencing Reform Act and the Sentencing Guidelines, up to and including the statutory maximum term of imprisonment * * *." *Ibid.*

As part of the plea agreement, petitioner and the government stipulated that the quantities of heroin involved in the distributions charged in Counts 5, 8 and 9 were "relevant conduct," under Sentencing Guidelines § 1B1.3, for purposes of calculating petitioner's base offense level under Guidelines § 2D1.1. C.A. App. 15.

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[2] Petitioner's appendix does not contain a complete version of the court of appeals' opinion. See Pet. App. 14a. We therefore cite to the published opinion at 235 F.3d 858.

The parties further stipulated that the appropriate base offense level was 22, based on a total quantity of 67.2 grams of heroin, and that petitioner was entitled to a three-level downward adjustment, under Guidelines § 3E1.1, for acceptance of responsibility. C.A. App. 15-16. The plea agreement provided, however, that these stipulations "cannot and do[] not bind the sentencing court, which may make independent factual findings and may reject any or all of the stipulations entered into by the parties." *Id.* at 12.

3. The presentence report (PSR) determined that the "relevant conduct" for which petitioner was accountable included not only the 67.2 grams of heroin to which the parties had stipulated, but also the 293.4 grams of heroin and the 311.2 grams of cocaine that had been seized from the Hawthorne Place apartment. PSR paras. 123-125, at 28; *id.* at para. 201, at 40. Based on that determination, the PSR recommended a base offense level of 28, to be reduced by three levels for acceptance of responsibility. PSR paras. 119-120, 126, 133-134, at 27-29; *id.* at 43 (Addendum). With a total offense level of 25 in criminal history category III, petitioner's Guidelines range was 70-87 months' imprisonment. PSR para. 200, at 40.

Petitioner objected to the inclusion of the quantities of heroin and cocaine seized from the Hawthorne Place apartment in the calculation of his base offense level. In response, the probation office supplemented the PSR with a written statement signed by, and FBI reports of oral statements made by, petitioner's son. PSR Memo. 1-20; see Gov't C.A. Br. 13.

The district court adopted the findings and determinations set out in the presentence report. C.A. App. 50, 52-53. Based on petitioner's concession that the FBI agents, if called, would testify in accordance with their

reports, *id.* at 43-44, the court found that "[i]t [was] clear from the submission of [the] Probation [office] and the FBI reports * * * that the larger amount, the amount in the apartment, should be attributed to [petitioner]." *Id.* at 50. The court sentenced petitioner to 85 months' imprisonment.

4. The court of appeals affirmed. 235 F.3d 858. The court rejected petitioner's argument that his 85-month sentence was imposed in violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The court concluded that the increase in petitioner's Guidelines sentencing range based on the drugs seized at the apartment did not violate *Apprendi*, because petitioner's final sentence did not exceed the 20-year maximum term authorized by 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999) for the offense to which petitioner pleaded guilty. 235 F.3d at 862-863. The court also concluded that *Apprendi* did not forbid the district court to take the additional drugs into account in setting petitioner's sentence within the 20-year maximum, merely because an offense involving the higher quantity of drugs could also have carried a higher sentence under a different subsection of Section 841(b). *Id.* at 863-865.

ARGUMENT

Petitioner contends (Pet. 12-16) that his 85-month sentence for distributing heroin is unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because in applying the federal Sentencing Guidelines the district court took into account, as "relevant conduct," quantities of drugs for which petitioner did not admit responsibility when he pleaded guilty. In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Petitioner did not raise any *Apprendi*-type claim in the district court. His present claims are therefore reviewable only for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997). To meet that standard, a defendant must show that there was error; that the error was "plain"; that it "affect[ed] substantial rights"; and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." See *Johnson*, 520 U.S. at 467 (citation omitted).

1. Petitioner's heroin-trafficking offense was subject to sentencing in accordance with the graduated penalties set forth in 21 U.S.C. 841(b) (1994 & Supp. V 1999). Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years" for a drug offense involving *any* quantity of a Schedule I controlled substance such as heroin. Petitioner was sentenced to 85 months' imprisonment. Accordingly, the district court's determination of drug quantity for purposes of applying the Sentencing Guidelines did not "increase[] the penalty for [petitioner's] crime beyond the prescribed statutory maximum," 530 U.S. at 490, and there was no error under *Apprendi*.

The court of appeals correctly rejected petitioner's argument that *Apprendi* should be extended to findings concerning "relevant conduct" under Section 1B1.3 of the Sentencing Guidelines, which may increase a defendant's Guidelines range, but have no effect on the applicable statutory range. See 235 F.3d at 862-863. This Court has upheld the use and operation of the Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and it has made clear that so long as the

statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" facts that establish the Guidelines sentencing range, such as type and quantity of drugs under Guidelines § 2D1.1(c).). *Apprendi* does not hold otherwise. See 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515).

The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors"—such as the amount of contraband involved in an offense—that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). Moreover, a district court has the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). The Guidelines thus leave the sentencing court with significant discretion in imposing a sentence within the statutory range. And specific offense characteristics and sentencing adjustments under the Sentencing Guidelines can never cause a

sentence to exceed the applicable statutory maximum. See Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"). Accordingly, nothing in *Apprendi* suggests that use of the Guidelines is constitutionally problematic.[3]

Every other regional court of appeals has agreed with the Third Circuit's conclusion in this case that *Apprendi* does not apply to findings that simply help determine what sentencing range is applicable under the Guidelines, without changing the statutory maximum or minimum penalty for the offense. See, *e.g.*, *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001) (No. 00-10197); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Baltas*, 236 F.3d 27 (1st Cir.), cert. denied, 121 S. Ct. 1982 (2001) (No. 00-9291); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 121 S. Ct. 1393 (2001) (No. 00-8591); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), petition for cert. pending, No. 01-5152 (filed July 5, 2001); *United States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 121 S. Ct. 1152 (2001) (No. 00-7819); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th

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[3] The conclusion that *Apprendi* does not affect the Guidelines as they presently operate makes it unnecessary to address petitioner's further argument (Pet. 17-19) that even "substitution of a proof beyond a reasonable doubt standard would [not] be [a] constitutionally sufficient" way to implement the Guidelines' "relevant conduct" provisions.

Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000). There is no reason for this Court to consider the issue.[4]

2. Petitioner also suggests (Pet. 14-16), and the court of appeals considered and rejected (235 F.3d at 863-865), an argument that *Apprendi* applies here because the quantity of heroin that the district court determined should be attributed to petitioner for purposes of sentencing under the Guidelines would, had it been charged and proved as part of the offense of

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[4] The original opinion in *United States* v. *Fields*, 242 F.3d 393, 397-398 (D.C. Cir. 2001), which petitioner cites (Pet. 15), suggested that *Apprendi* applied to the determination of facts relevant only to the application of the Sentencing Guidelines. On rehearing, however, the court corrected its "loose language" and reiterated that "*Apprendi* does not apply to enhancements under the Sentencing Guidelines when the resulting sentence remains within the statutory maximum." *United States* v. *Fields*, 251 F.3d 1041, 1043-1044 (D.C. Cir. 2001). The other cases petitioner cites (Pet. 15) do not support his position. In *United States* v. *Sullivan*, 255 F.3d 1256, 1264-1265 (2001), superseding 242 F.3d 1248 (2001), the Tenth Circuit held (as it had in *Heckard*, *supra*) that *Apprendi* does not apply to sentencing factors that increase a defendant's Guidelines range but do not increase the statutory maximum. *Nealy*, *supra*, and *Doggett*, *supra*, hold the same. *United States* v. *Harris*, 243 F.3d 806, 808-810 (4th Cir. 2001), petition for cert. pending, No. 00-10666 (filed June 18, 2001), and *United States* v. *Sandoval*, 241 F.3d 549, 550-551 (7th Cir. 2001), refused to apply *Apprendi* to facts that set a mandatory minimum sentence without increasing the statutory maximum. *United States* v. *Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000) (en banc), holds that *Apprendi* does not apply to prior convictions that enhance a defendant's sentence under the federal "three strikes" statute. And *United States* v. *Terry*, 240 F.3d 65, 74 (1st Cir.), cert. denied, 121 S. Ct. 1965 (2001) (No. 00-1587), held in the alternative that, on particular facts, failure to submit drug quantity to the jury did not require reversal for plain error.

conviction, have led to a statutory sentencing range of 5-40 years' imprisonment. That range is higher than the range of 0-20 years' imprisonment that is authorized by Section 841(b)(1)(C) for the offense to which petitioner pleaded guilty.

Any such argument rests on a confusion between statutory and Guidelines sentencing. Petitioner pleaded guilty to a charge of distributing an unspecified quantity of heroin on a particular occasion. The offense in fact involved distribution of 21 grams of heroin on April 28, 1998. See note 1, *supra*. Under 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999), petitioner could not have been sentenced to more than 20 years' imprisonment for that offense, even before *Apprendi*. Any factual determinations the district judge made at sentencing, whether about "relevant conduct" (including the overall amount of drugs for which petitioner might be held responsible) or about petitioner's history or character, could only serve to help the judge determine at what point petitioner should be sentenced within the statutory range of 0-20 years' imprisonment. Accordingly, the district court's decision to take into account quantities of drugs not specifically contemplated by the parties' plea agreement did not in any sense "increase[] petitioner's [sentencing] exposure from 0-20 years to 5-40 years." Pet. 14. This case provides no factual basis for any *Apprendi* argument

based on even a theoretical increase in the statutory sentencing range.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] For the same reason, petitioner misplaces his reliance (Pet. 15) on *United States* v. *Ramirez*, 242 F.3d 348 (6th Cir. 2001), which vacated a 20-year mandatory minimum sentence that had been imposed under Section 841(b)(1)(A), even though it did not exceed the maximum of 30 years authorized for a recidivist defendant under Section 841(b)(1)(C). Cf. *United States* v. *Stafford*, No. 99-5706, 2001 WL 818245, at *11 n.9 (6th Cir. July 17, 2001) (noting limitation of *Ramirez*'s holding).